

05-1420  
Personal Penalty Assessment  
Signed 08/08/2006

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
	)	Appeal No.	05-1420
v.	)		
	)		
TAXPAYER SERVICES DIVISION OF	)	Tax Type:	Personal Nonpayment Penalty
THE UTAH STATE TAX	)		Withholding
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

---

**Presiding:**  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REPRESENTATIVE  
PETITIONER  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, Tax Compliance Agent

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on May 9, 2006. Petitioner is appealing a personal penalty assessment made against Petitioner for the unpaid withholding taxes of the business COMPANY. The unpaid taxes were for the periods from February 1, 2004 through September 30, 2004. The total amount of the personal penalty assessment was \$\$\$\$\$. The Statutory Notice was issued on August 31, 2005.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid withholding tax liabilities. It is listed in Utah Code Sec. 59-1-302 (2004) and provides in pertinent part:

(1) The provision of this section apply to the following taxes in this title: (a) a tax under Chapter 10, Part 4, Withholding of Tax; . . . (c) a tax under Chapter 12, Part 2, Local Sales and Use Tax Act; (d) a tax under Chapter 12, Part 3, Transient Room Tax; . . . (g) a tax under Chapter 12, Part 6 Tourism, Recreation, Cultural, and Convention Facilities Tax; . . .

(2) Any person required to collect, truthfully account for, and pay over any tax listed in Subsection (1) who willfully fails to collect the tax, fails to truthfully account for and pay over the tax, or attempts in any manner to evade or defeat any tax or the payment of the tax, shall be liable for a penalty equal to the total amount of the tax evaded, not collected, not accounted for or not paid over. This penalty is in addition to other penalties provided by law . . .

(7)(a) in any hearing before the Commission and in any judicial review of the hearing, the commission and the court shall consider any inference and evidence that a person has willfully failed to collect, truthfully account for, or pay over any tax listed in Subsection (1).

(b) It is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any of the taxes listed in Subsection (1) if the commission or a court finds that the person charged with the responsibility of collecting, accounting for or paying over the taxes:

(i) made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes;

(ii) recklessly disregarded obvious or know risks, which resulted in the failure to collect, account for, or pay over the tax; or

(iii) failed to investigate or to correct mismanagement, having notice that the tax was not or is not being collected, accounted for, or paid over as provided by law.

(c) The commission or court need not find a bad motive or specific intent to defraud the government or deprive it of revenue to establish willfulness under this section.

DISCUSSION

In this matter Respondent determined that Petitioner was a person responsible for collecting and paying over the tax based on the factors that Petitioner was the owner of the business, an officer and director, signed on the bank accounts and provided personal guarantees for loans. Petitioner argues that he did not willfully fail to remit the taxes at issue.<sup>1</sup>

The circumstances leading up to the tax deficiency were as follows. PETITIONER had been a part owner in COMPANY, (“COMPANY”) along with one other individual who was a CPA. The CPA handled all the financial affairs of the business. PETITIONER had little day-to-day involvement as he was busy with other business activities not related to COMPANY. In 2003 the CPA part owner determined that he wanted to sell out his ownership interest in the business and would no longer be involved.

At this point PETITIONER was concerned that he did not have the time or the financial expertise to manage the business and finances. Accordingly he began talking with several individuals who were employees of COMPANY and indicated that they could run the business on the day-to-day basis. In the summer of 2003 they began talking about terms of an agreement whereby these four individuals would acquire a 49% ownership of COMPANY. Although an agreement may have been drafted, the parties never signed it and the ownership interests were never legally transferred. The four individuals were PARTNER 1, PARTNER 2, PARTNER 3 and PARTNER 4. Regardless, PETITIONER turned the day-to-day management and financial control of the business over to these individuals. They were made the directors and officers of the corporation, along with PETITIONER who was the vice president.

After turning the business over to these individuals, PETITIONER began providing financial support to COMPANY by loaning funds directly to the business and personally guaranteeing loans to secure additional financing. Although he was a signor on the business checking account, the account required two

---

<sup>1</sup> Petitioner relies in part on *Stevenson v. Tax Commission, Taxpayers Services Division*, Utah Court Appeals, No. 20030748-CA, 2005 Utah App. LEXIS 175, (2005). The Commission notes that the *Stevenson* decision was appealed to the Utah Supreme Court and a decision is pending, which decision may be relevant to the issues

signatures per check and PETITIONER rarely signed any checks. He indicates that he knew from his prior partner in the business that payment of taxes should be given priority and that he did ask PARTNER 2, the person who was handling the financial aspects of the business, about taxes. He states that she would represent to him that the taxes were being paid. By spring of 2004 he had started getting some feedback from bank representatives that started to cause him concern. Although PETITIONER always had access to the financial accounts of the business, he indicates he did not have the expertise to understand them. In July he asked his son to take a look at the records and accounts. After a review his son advised his father to stop lending money or guaranteeing loans for the business. According to PETITIONER this is when he discovered the business had erred in accounting for inventory. The inventory was added on COMPANY'S books but it was never taken off as it was sold, causing it to be overstated. PETITIONER indicates that he did not find out about unpaid taxes until after the bank had caused the sale of the assets of the business to be sold at ( X ) sale.

It is Petitioner's position that PETITIONER never "willfully" failed to turn over the tax, that "willfully" required some element more than negligence. Petitioner's representative argued that in order for him to be willful he would have had to have known that the taxes were not being paid. The Commission notes that much of PETITIONER'S proffered information was unrefuted by Respondent and the weight of the evidence supports his contention that he did not have actual knowledge of the unpaid taxes until after the business ceased operations. The Division mentioned a notice at some point that was sent to his house, but did not have a copy to submit in this matter and the unsupported allegation is insufficient to refute PETITIONER'S proffer. The Division also points out that COMPANY paid the payments on PETITIONER'S truck and some payments on a motorcycle.

PETITIONER was clearly a party responsible for seeing that the taxes were paid. The question is whether or not his actions were willful. Utah Code Sec. 59-1-302 (7) (b) provides three scenarios

---

presented in this matter.

Appeal No. 05-1420

that are prima facie evidence that a person has willfully failed to pay over the tax. Two of these subsections 59-1-302(7)(b)(i) & (iii) indicate knowledge of the unpaid taxes. The third indicates it is prima facie evidence that a person has willfully failed to pay over the tax where the person has “recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax.” In this matter PETITIONER relied on other parties to pay the taxes and was told that they were being paid. It would not have been till the spring of 2004 that he started to understand that there were financial problems with the business, he did investigate by bringing in his son to look at the accounting books and a more accurate representation of the financial condition of the business was reported to him. As he was the only legal owner of the business he could have taken charge of the business and at this point he was recklessly disregarding obvious or known risks to rely on the other parties to pay the tax.

DECISION AND ORDER

Based on the foregoing, the personal penalty assessment against Petitioner for the period February 1, 2004 through May 31, 2004 is hereby abated. The personal penalty assessment against Petitioner for the period from July 1, 2004 through September 30, 2004 is hereby sustained. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission  
Appeals Division  
210 North 1950 West  
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

Appeal No. 05-1420

---

Jane Phan  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

*JKP/05-1420.int.doc*